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AT LAW

Making Sausage The Ninth Circuit's Opinion

by Carl E. Schneider

decide what evidence will be introduced, the judge does not hear what will not benefit the parties, and the quality of the information introduced crucially depends on the wit and learning of the attorneys the Quinlans or the Cruzans happen to hire and of the too often modestly gifted political appointees and civil servants who represent state governments. To be sure, interested groups may file "friend of the court" briefs. But in my experience, appellate judges (at least) rarely read them.

Suppose, though, that this haphazard process leaves the federal trial judge well informed. That judge's decision will only affect the people within that judge's district. If several states are to be reached, the case must be presented to a circuit court of appeals. If the whole country is to be reached, the case must be taken to the Supreme Court. Ironically, though, as the case's reach widens, the judge's contact with the evidence shrinks. The parties normally reprint only a few significant documents from the trial record for the appellate judges. And those judges typically do not read even these excerpts, much less ask to see the whole record. Rather, they read the parties' briefs and listen to their oral arguments. In the Supreme Court, briefs are limited to fifty pages and oral arguments to thirty minutes.

Moreover, judges have little time to educate themselves, to reflect on a case, or to write an opinion. The courts of appeals are often egregiously far behind in their work. The Supreme Court takes only a limited number of cases each year (in addition to reviewing more than 5,000 requests to hear cases), but the Court limits its docket to the most perplexing and controversial statutory and constitutional cases that arise each year, and mastering them during the Court's nine-month term is, to say the least, challenging.

To help them with this work, Supreme Court justices now commonly hire several clerks, most of whom graduated from law school a year previously. In the chambers of the justice for whom I clerked, the burden of the Court's work meant that cases were handled like this: The justice would read the parties' briefs in each case;

As I write, the Supreme Court has just agreed to hear *Compassion in Dying v. Washington* and *Quill v. Vacco*, the two cases in which United States circuit courts of appeals held that a state may not constitutionally prohibit physicians from helping a terminally ill person who wishes to commit suicide to do so. These cases have already received lavish comment and criticism, and no doubt the Supreme Court's opinion will garner even more. Reasonably enough, most of this analysis addresses the merits of physician-assisted suicide as social policy. I, here, want to talk about how setting bioethical policy through constitutional adjudication actually works and how its usefulness is diminished by some practical deficiencies.

Courts are often thought well-equipped to resolve social issues because they are guided by the thought and wisdom that animated the Constitution. Sometimes this argument has some truth. But bioethical questions are generally resolved under a provision (the Fourteenth Amendment) that says only that no state shall "deprive any person of life, liberty, or property without due process of law." These words, noble though they are, give courts little insight and little direction. The Supreme Court has been able to find in them such a suspiciously wide range of lessons—from the unconstitutionality of statutes limiting a woman's right to an abortion to the unconstitutionality of statutes limiting the hours an employee can be required to work—that one may

begin to wonder just what the justices have been consulting.

The vagueness of the Fourteenth Amendment throws judges back on their own resources. Because judges vary in experience and talent, these resources vary. But all judges are lawyers. A lawyer's training is centrally about analyzing legal documents, particularly judicial opinions. It does little, for example, to equip lawyers to understand and respect empirical evidence about social behavior and does too much to convince them that the best evidence about how the world works is the particular facts of a litigated case. The practice of law may remedy some of these ills, but today most sophisticated legal practice is too specialized to expose lawyers broadly to social issues. Yet once appointed, judges must become the broadest kinds of generalists. In short, judges are lawyers who—narrowly trained and narrowly experienced—are unlikely to come to the extraordinary range of problems they face with expertise or understanding.

What is worse, judges are less well situated to learn about these problems than one might expect. True, the trial-court judge presides over proceedings in which evidence is introduced. But a systematic flaw of constitutional adjudication is that it promulgates grand principles on the basis of a single case's facts. Courts tend to assume that the case before them typifies the social problem at issue and that the parties before them represent all relevant points of view. And since the parties, not the judge,

the three clerks divided the cases among them. Before oral argument, the clerks and the justice would discuss the cases. The justice would listen to the oral arguments, and the Court would deliberate and vote privately. If my justice was assigned to write an opinion, the clerk who had worked on the case would draft it. He had ten days in which to do so. In that time, he continued to read briefs and to write memoranda to the justice on the petitions to hear cases that kept pouring into the Court. When the clerk was finished drafting the opinion, the justice would read it over and edit it lightly.

I admired the lawyerly skills of the justice for whom I clerked. (I had less admiration for my own skills, one year out of law school.) But I think the practical deficiencies of making social policy through constitutional adjudication—the inexperience judges bring to a case, the improverished opportunities they have for examining the case's social landscape, and the time pressures which harass them—are severe and offer the most charitable explanation for the regrettable quality of the Ninth Circuit's opinion in *Compassion in Dying*.

For example, the court in that case appears to have known little about medical decisions at the end of life. The court (perhaps influenced by the stories of the three plaintiffs who were patients) creates the impression that hospitals are awash in terminally ill patients driven to commit suicide by unendurable pain. It offers no indication of the numbers at stake, and growing evidence raises doubt that pain is the principal motivation of those requesting assisted suicide. The court "believe[d] that most, if not all, doctors would not assist a terminally ill patient to hasten his death as long as there were any reasonable chance of alleviating the patient's suffering or enabling him to live under tolerable conditions." Yet it has long been clear and has recently become clearer (through the SUPPORT study) that many doctors undertreat pain. The court "also believe[d] that physicians would not assist a patient to end his life if there were any significant doubt about the patient's true wishes." Yet the history of bioethics is in no small part a reaction to the sobering number

of doctors who have not been driven to understand patients' wishes, who have not understood them, and who have ignored them even when they have understood them. The court dismisses out of hand the difficulty of defining "terminal," and seems innocent of any awareness of how hard it can be to apply any such definition.

The court's easy equation of withdrawing treatment and assisted suicide, and its peremptory rejection of the principle of double effect, may likewise be due to the court's need to make decisions with dangerously little learning, for the court gives scant sense of understanding the long and thoughtful ethical debate over these subjects. The court's refusal to consider how far its reasoning carries beyond its ruling may have similar roots. The court explains that refusal by saying that its task is to "decide only the issue before us." If this is true, it is another defect of constitutional adjudication as an instrument of social policy, for what could be more perverse in an area so pervaded by slippery-slope problems than to prevent policymakers from considering where their decisions might lead?

The court might have had to grapple more seriously with its arguments had it been responsible for writing rules to govern its new regime of suicide. But the court loftily confined itself to general principles and airily dismissed the regulatory difficulties of that regime: "we believe that sufficient safeguards can and will be developed by the state and medical profession . . . to ensure that the possibility of error will ordinarily be remote." In light of the twenty-year struggle states have had with courts over regulating abortions, the Ninth Circuit's complacency is hard to account for (particularly since the court repeatedly and proudly cites the Supreme Court's latest major abortion decision, *Planned Parenthood v. Casey*).

Finally, the deficiencies of constitutional policymaking may help explain the Ninth Circuit's astonishing confidence. Thus the court blandly announced that the Supreme Court's opinions in "Planned Parenthood v. Casey . . . and Cruzan v. Director, Missouri Dept. of Health . . . are fully persuasive, and leave little doubt as to the proper result."

One virtue of resolving social disputes judicially is supposed to be that judges are detached, disinterested, dispassionate observers who bring cool judgment to over-heated questions. But as judges become the tribunes of the people, they may be hard-pressed to sustain that moderation and calm. Judge Reinhardt's opinion, for instance, is disfigured by his contempt for those who have affronted him with their disagreement. He characterizes their arguments as "disingenuous," "meretricious," "ludicrous," "nihilistic," and "inflammatory." He then piously concludes by hoping "that whatever debate may accompany the future exploration of the issues we have touched on today will be conducted in an objective, rational, and constructive manner that will increase, not diminish, respect for the Constitution."

It is said that law and sausages are two things one should never see being made. I have tried to show why the practical deficiencies of constitutional adjudication make it a clumsy tool for formulating bioethical policy and why those deficiencies may help explain a painfully unsatisfying opinion. But is not all law-making just as unappetizing? I have several responses. First, my purpose here has been to correct a common over-estimate of the purity of the judicial process. Second, I believe that the full battery of policymaking institutions—appointed commissions, administrative regulations, legislative hearings and debates, common-law adjudication, and referenda—together work better than constitutional policymaking. These processes are better situated to assemble and analyze information and to develop acceptable programs. And, unlike constitutional policymaking, none of these processes is effectively final. Most of all, these processes are more consonant with democratic government. In recent decades, we have been reconsidering our ideas about death as the legal rules concerning abortion, brain death, and terminating treatment have changed. Assisted suicide is a serious step in this necessarily troubling process. It is a question too important to cede to courts.